

Vincent et Vincent of Allentown Mall, Inc. and Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO. Case 5-CA-12004

January 12, 1981

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On April 16, 1981, Administrative Law Judge Morton Needelman issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge only to the extent consistent herewith, to modify the remedy,³ and to adopt his recommended Order, as modified herein and set forth in full below.

The facts, more fully set out in the Decision of the Administrative Law Judge, indicate that in late 1979 and early 1980 the Union attempted to organize several of Respondent's beauty salons including one in Camp Springs, Maryland. From the outset Camp Springs employee Barbara Akers supported the Union. She passed messages from the organizers to her coworkers, distributed union literature, and solicited authorization cards. The evidence shows her efforts on behalf of the Union were known to Camp Springs Manager Dale Terwilliger. In response to the organizational effort, Respondent distributed literature adverse to union

membership in mid-January 1980,⁴ and called a meeting on February 9 at which Supervisor Freide told approximately 15 employees of Respondent's opposition to the Union. As set forth below, Freide's remarks included a number of statements violative of Section 8(a)(1) of the Act.

The Administrative Law Judge concluded, and we agree, that Respondent violated Section 8(a)(3) on February 20 by discharging Akers because of her protected union activities.⁵ We also agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) by virtue of Freide's statements during the February 9 meeting that he would never engage in collective bargaining with a union. Such a statement constitutes an anticipatory refusal to bargain, as fully detailed in the Administrative Law Judge's Decision. We also find, contrary to the Administrative Law Judge, that Freide's statements at the February 9 meeting threatening to discharge or replace employees if they went on strike, and that if they objected to his views about unions they could leave, as well as his earlier solicitation and interrogation of Karen Davis, were all violations of Section 8(a)(1) of the Act.

During Freide's conversation with employee Karen Davis in January, he asked Davis if she had heard about the Union. He also remarked to Davis that since she had been in the business a long time and knew that a union could not help the employees she should discourage the "young girls" from joining the Union. We do not agree with the Administrative Law Judge that the conversation was so brief and conducted in such a casual manner as to preclude an inference of improper interference or a tendency to be coercive.⁶ The solicitation of Karen Davis to reject the Union is, in itself, an 8(a)(1) violation regardless of the alleged noncoercive tenor of the supervisor's actual remarks during such conversation.⁷ By soliciting help from Davis individually, Freide was actually soliciting her to influence other employees to support Respondent

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

In the absence of exceptions we adopt *pro forma* the Administrative Law Judge's finding that there was no evidence that Terwilliger engaged in illegal interrogations of employees concerning an employees' meeting which took place sometime in February. In reaching this conclusion, we note that the General Counsel's exceptions refer only to alleged unlawful interrogation by Freide. We likewise adopt *pro forma* his failure to find unlawful certain restrictions placed on employee discussions of the Union.

³ See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

⁴ Hereinafter all dates are 1980 unless otherwise specified.

⁵ Member Jenkins does not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), cited by the Administrative Law Judge. That decision concerns identifying the cause of a discharge where a genuine lawful and a genuine unlawful reason exist. Where, as here, the asserted lawful reason is found to be a pretext, only one genuine reason remains—the unlawful one. To attempt to apply *Wright Line* in such a situation is futile, confusing, and misleading.

⁶ The Administrative Law Judge's reliance on *Delco-Remy, Div. of General Motors v. N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979), in which the court denied enforcement of a Board Order is, with all due respect to that court, inconsistent with current Board law. It is well settled that the duty of an administrative law judge is "to apply established Board precedent which the Supreme Court has not reversed." *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965).

⁷ *Electrical Fittings Corporation, a Subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975).

against union representation.⁸ It is equally well settled that interrogation of employees with respect to their union attitudes and sympathies without a legitimate purpose and adequate assurances against reprisal, which is the situation disclosed by this record, is inherently coercive, and hence violates Section 8(a)(1).⁹

We turn next to Freide's threat on February 9 to discharge or replace the employees if they went on strike. The record reveals that the three employee witnesses gave somewhat different versions of Freide's remarks at the February 9 meeting with respect to the possibility of being replaced or fired. According to Akers, Freide said that, if the employees went on strike, he would replace them. Kyle testified that Freide said, if the employees went on strike, they would either lose their jobs or be replaced. Davis testified that Freide said "that if we went union, he would fire us all."

Although the Administrative Law Judge made no credibility determinations with respect to the differences in these witnesses' testimony, we find it unnecessary to resolve any inconsistency in these accounts. The threat to fire strikers is clearly illegal. Additionally, the threat to replace strikers in the context presented here is likewise unlawful. An analysis of Respondent's entire antiunion campaign reveals an implicit warning that in dealing with the Union Respondent would so conduct the negotiations that a strike would result. Thus, there was but one theme: the inevitability of a strike if the employees selected the Union as their bargaining representative, and the dire consequences of such a strike, namely, the loss of jobs by the strikers. As the Administrative Law Judge here held, "Such an anticipatory refusal to bargain interferes with employees' free choice since it tends to create an atmosphere of futility, and of the inevitability of failure and concomitant employer-employee strife which, in turn, may lead to strikes and loss of jobs." We conclude that such appeals to the employees created an atmosphere rendering the exercise of free choice impossible and tended to interfere with, restrain, and coerce its employees in the exercise of their rights guaranteed by Section 7. Accordingly, the Respondent's threats of discharge or replacement were violative of Section 8(a)(1).¹⁰

Also, as found by the Administrative Law Judge, the accounts of witnesses Akers and Kyle indicate that at this February 9 meeting Freide said in effect

that he did not want a union, that in his opinion a union brought trouble, and that if the employees did not like it they could leave. Although the Administrative Law Judge acknowledged that this statement could be interpreted as a threat of reprisal, he found that, since it was capable of a lawful interpretation, it was protected by Section 8(c) of the Act. This analysis is inconsistent with established Board law. In accord with precedent, we find that such remarks constitute a veiled threat designed to convey the impression that management considers continued employment incompatible with engaging in union activities. *Markle Manufacturing Company of San Antonio*, 239 NLRB 1353 (1979).¹¹ Accordingly, we conclude that Respondent's statement comes within that interference and coercion proscribed by Section 8(a)(1).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Vincent et Vincent of Allentown Mall, Inc., Camp Springs, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that Respondent would not bargain with Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO, or any other labor organization.

(b) Discouraging membership in Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO, or any other labor organization, by discharging employees or by discriminating in any other manner against employees in regard to hire or tenure of employment or any term or condition of employment.

(c) Telling employees that continued employment is incompatible with union activity.

(d) Threatening employees that if they go on strike they will be discharged, fired, or replaced.

(e) Soliciting employees for the purpose of discouraging other employees from joining the Union.

(f) Interrogating employees about the Union.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Barbara Akers immediate and full reinstatement to her former job or, if that job no

⁸ See *Amber Delivery Service, Inc.*, 250 NLRB 63 (1980).

⁹ See *Aero Corporation*, 233 NLRB 401 (1977).

¹⁰ Moreover, the Board has held that an employer violates the Act when he avers that strikers, whether for economic or unfair labor practice reasons, will be permanently replaced immediately upon striking, without limiting his statements to a lawful pronouncement that he is legally entitled to replace economic strikers only. See *Huck Manufacturing Company*, 254 NLRB 739 (1981).

¹¹ In addition, we find the threat to continued employment by Freide in a context of the antiunion remarks set forth above was in fact designed to have a coercive effect on the employees.

longer exists to a substantially equivalent job, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her by payment to her of a sum of money equal to the amount she normally would have earned as wages, plus interest, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of Barbara Akers on February 20, 1980, and notify her in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against her.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its premises in Allentown Mall, Camp Springs, Maryland, copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we

have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discourage membership in Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO, or any other labor organization, by discharging employees or by discriminating in any other manner against employees in regards to hire or tenure of employment or any term or condition of employment.

WE WILL NOT inform our employees that we will never engage in collective bargaining with a Union.

WE WILL NOT employees that continued employment is incompatible with union activity.

WE WILL NOT unlawfully threaten our employees that if they go on strike they will be discharged, fired, or replaced.

WE WILL NOT solicit our employees for the purpose of discouraging other employees from joining the Union.

WE WILL NOT interrogate our employees about the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by the National Labor Relations Act.

WE WILL offer Barbara Akers immediate and full reinstatement to her old job or, if that job no longer exists, to a substantially similar job without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL pay Barbara Akers any wages she lost because we fired her, plus interest.

WE WILL expunge from our files any references to the discharge of Barbara Akers, and WE WILL notify her in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future discipline against her.

All our employees are free, without any objection from us, to become or refrain from becoming or remaining members of Barbers and Cosmetologists Division, United Food and Commercial

Workers' Union, Local 400, AFL-CIO, or any other union.

VINCENT ET VINCENT OF ALLENTOWN MALL, INC.

DECISION

STATEMENT OF THE CASE

MORTON NEEDLEMAN, Administrative Law Judge: This case was heard in Washington, D.C., on January 27, 1981. The charges were originally filed by the Barbers and Cosmetologists Division, United Food and Commercial Workers' Union, Local 400, AFL-CIO, and later amended on May 15, 1980.¹ The complaint was issued on July 17, 1980. It alleges that Vincent et Vincent of Allentown Mall, Inc. (hereinafter Respondent), acting through its treasurer, William Freide, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (hereinafter Act), in January and February 1980 by interfering with, restraining, and coercing employees at its Camp Springs, Maryland, location in the exercise of their rights guaranteed under Section 7 of the Act by engaging in the following practices: threatening employees with discharge for supporting the Union; interrogating employees regarding their own and their fellow employees' union activities; soliciting employees to discourage their fellow employees from supporting the Union; telling employees that Respondent would close down before it would bargain with the Union; saying to employees that Respondent would not have a union at the Camp Springs, Maryland, shop, and if the employees did not like that prospect, they could leave. The complaint further alleges that Respondent discriminated against Barbara E. Akers by terminating her employment because of her membership in, assistance to, and activities on behalf of the Union.

Respondent's answer denied the substantive allegations of the complaint, but at the hearing Respondent admitted all jurisdictional facts as well as allegations relating to status of the Union as a labor organization and the supervisory status of William Freide and Dale Terwilliger, manager of Respondent's Allentown Mall salon. As a result of these admissions, the issues at the hearing were limited to (1) whether William Freide engaged in threats, solicitation, and interrogation which interfered with and coerced employees in the exercise of their rights under Section 7; and (2) whether Respondent discriminated against Barbara Akers by firing her because of her union activities.

All parties were given full opportunity to participate in the hearings by introducing evidence, examining and cross-examining witnesses, and presenting oral argument. Briefs were filed by the General Counsel and Respondent on March 25, 1981. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

¹ After the complaint issued, the Barbers, Beauticians and Allied Industries International Association merged into the United Food and Commercial Workers' Union (hereinafter Union). The name in the case has been changed to reflect this merger.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent's Business; the Union's Labor Organization Status; Commerce; The Role of William Freide

The jurisdictional facts are not in dispute. Respondent, Vincent et Vincent of Allentown Mall, Inc., a Maryland corporation, operates a beauty salon in the Allentown Mall in Camp Springs, Maryland. Respondent corporation is part of a related chain of 16 corporations which operate 16 beauty salons under the trade name "Hair Pair" in the Washington, D.C., area.²

Respondent and all other corporations in the chain are owned and controlled by Vincent Gesumaria, president, Walter W. Stern, vice president, William Freide, treasurer, and Meyer Samuels, secretary. By virtue of the control exercise by these officers over the business operations and labor relations policies of the entire chain, the 16 corporations are properly considered as a single employer.

During the 12-month period prior to the issuance of the complaint, a representative period, the gross volume of business from the operations of the various beauty salons in Respondent's chain exceeded \$500,000. During the same period, Respondent purchased and received products valued in excess of \$50,000 directly from points located outside the State of Maryland.³

Thus, it is undisputed that Respondent is, and has been, an "employer" as defined in Section 2(2) of the Act; that Respondent is, and has been, engaged in "commerce" and in operations "affecting commerce" as defined in Section 2(6) and (7) of the Act, respectively; that the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act; and that William Freide is, and has been, an agent of Respondent and a supervisor within the meaning of Section 2(11) of the Act.

B. Background; Union Activity; Alleged 8(a)(1) Violations

This matter involves a labor-relations conflict which arose between January and February 20, 1980, at Respondent's beauty salon in the Allentown Shopping Mall in Camp Springs, Maryland. The Camp Springs salon employs 18 workers who are variously classified as receptionists, hairdressers (or haircutters or operators), and shampoo girls. From the time the Camp Springs salon opened 7 years ago, it has been managed by Dale Terwilliger. Respondent's treasurer, William Freide, regularly calls at the Camp Springs salon as part of his chain-wide supervisory responsibilities.

In the background of the Camp Springs labor dispute was an attempt by the Union to organize several of Respondent's shops including the salon on Seminary Road in Virginia, where the Union had planted one of its paid

² The complaint refers to seven corporations. Freide testified that two of the salons listed in the complaint are not Hair Pair shops. In all, there are 16 corporations under the same management, including Vincent et Vincent of Allentown Mall, which operate 16 "Hair Pair" salons in the Washington, D.C., area.

³ See stipulation of February 24, 1981.

organizers, Lisa O'Leary-Young, to work as a shampoo girl. In mid-December 1979, Freide learned that a union campaign was underway at Seminary Road. His reaction to the campaign was described as follows by O'Leary-Young:

He told the employees that he was very upset about the union, that he did not want a union in the shop, he would not have a union in his shop, he wouldn't have anybody that belonged to a union working in his shop, they could just leave if they didn't like it, told them he was very distressed that there was a paid union organizer working at his shop. He told the employees that if they wanted to walk in the cold out on the picket line for however long they wanted to do it, that was fine with him, he didn't care.

He told all the employees that if they joined the union or tried to join the union, that they would be black listed and that they would not get a job anywhere else and no one would want to hire them, and then he also made references to look what unions had done to the United Auto Workers and some stuff about Jimmy Hoffa and other matters like that.⁴

The testimony of O'Leary-Young concerning Freide's attitude toward union activity at Seminary Road was offered (and received without objection) as evidence of union animus on the part of Respondent, and not as proof of a substantive 8(a)(1) violation. Freide's remarks during the Seminary Road campaign led eventually to the filing by the Union of unfair labor practice charges against Respondent, but these charges were not pursued after the Union was defeated in a representation election.

While the instant complaint makes no mention of the Seminary Road campaign, Respondent was put on notice even before this proceeding began that the Seminary Road remarks, which contain a patently unlawful threat of retaliation if the Union is supported, would be offered to show Respondent's general hostility to the Union's campaign. Since nothing in O'Leary-Young's account of Freide's remarks on Seminary Road was contradicted by Respondent, her testimony should at least be considered as evidence of Freide's general attitude toward the Union which may be weighed against other evidence indicative of a possible change in his attitude. As shown in the evidence reviewed below, there is no evidence whatever of such a change in attitude.

Soon after the Camp Springs organizational campaign began on January 14, 1980, Freide handed Barbara Akers and Becky Kyle, haircutters, a Chamber of Commerce pamphlet outlining the case against union membership. Akers, the alleged 8(a)(3) discriminatee, testified that Freide said, "Lisa [Lisa O'Leary-Young] thinks I can't fire you, I'll show you that I can." This testimony, however, was uncorroborated since it was not recalled by Kyle. Later, Freide asked haircutter Karen Davis if she

had heard about the Union. He also remarked to Davis that since she had been in the business a long time and knew that a union could not help the employees, she should discourage the "young girls" from joining the Union. Freide then took a union flyer away from Davis, and told her that she need not read this material. Respondent's attitude toward the Union was also demonstrated by the rule imposed by Manager Terwilliger forbidding employees to discuss the Union in the shop, although similar restrictions were not imposed on other private conversations.

In response to management's opposition to the organizational effort, several employees asked Freide to attend a meeting at the Camp Springs salon on February 9, 1980. Present at the meeting were Freide and some 15 employees. In Freide's version of what was said at this meeting, he was so scrupulous in avoiding *any* mention of the Union that he even refrained from bringing up his opposition to the signing of organizational cards, although he claims to have given some general advice warning the employees against the ill-advised signing of *any* papers.

Freide's account of what he said at the February 9 meeting taxes credulity. For even he concedes that the meeting was called to discuss employee grievances in the context of the Union's organizational campaign which management opposed. It is implausible that in such a setting the Union and its organizational effort were not mentioned by both the employees and Freide. In a word, Freide's version of what was *not* discussed, "I do not remember discussing unions," is so incredible, that I do not accept his version of what *was* said.

On the other hand, the testimony of three operators who attended the February 9 meeting (Akers and two other employees, Kyle and Davis) contains nothing which is innately unbelievable, and in giving testimony they seemed to be straight forwarded and sincere. This is not to say, however, that I have assigned equal probative weight to all facets of their testimony: corroborated recall was given great weight, while a single witness' uncorroborated version of what was said (in circumstances where corroboration was readily available) was given none. But it should be emphasized that differences in the ability of these three witnesses to recall uniformly all that was said at the meeting, which goes to the weight to be assigned a particular version of what happened, is in sharp contrast to the inherently incredible statement by Freide that the Union was never discussed at all.

According to the three witnesses, at the February 9 meeting the employees (through Becky Kyle, a haircutter and spokesperson for the employees) cited their grievances respecting pay, health benefits, and working conditions as their reasons for wanting the Union. All three witnesses testified that Freide responded by saying that he did not want a union, that in his opinion a union brought trouble, and that if the employees objected to his views about unions they could leave.

With respect to the possibility of being replaced or fired, the three employees gave somewhat different versions of Freide's remarks. According to Akers, Freide said that, if the employees went on strike, he would re-

⁴ At the time of the hearing herein, O'Leary-Young was a full-time employee of the union. O'Leary-Young has never worked at Respondent's Camp Springs shop. She voluntarily left the Seminary Road shop in February 1980.

place them. Kyle testified that Freide said, if the employees went on strike, they would either lose their jobs or be replaced. Davis testified that Freide said "that if we went union, he would fire us all."

Finally, Akers and Kyle testified that at the February 9 meeting Freide said he would never engage in collective bargaining with a union, and that if the employees went on strike they would lose their jobs.⁵ This statement, which significantly was not part of casual conversation with a single worker, but instead was announced before practically all the employees who had gathered to hear management's response to the Union's organizational campaign, is an unfair labor practice under Section 8(a)(1) of the Act as alleged in complaint paragraph 5(d). Such an anticipatory refusal to bargain interferes with employees' free choice since it tends to create an atmosphere of futility, and of the inevitability of failure and concomitant employer-employee strife which, in turn, may lead to strikes and loss of jobs. Moreover, Freide's statement that, in effect, he would never come to the bargaining table with an open mind (scarcely an accurate prediction if the statutory obligation to bargain in good faith is to be met) was calculated to have a coercive effect on employees who, "no more than the generality of mankind, are inclined to indulge in futile acts." *The Trane Company (Clarksville Manufacturing Division)*, 137 NLRB 1506, 1510 (1962).

Apart from Freide's remarks about his prospective refusal to bargain, the proof of other alleged 8(a)(1) violations has gaping holes. Thus, the evidence of alleged threats of reprisals by Freide for union activity, i.e., his alleged statement that "Lisa thinks I can't fire you, I'll show you that I can," and a threat purportedly made at the February 9 meeting, is murky. The "Lisa" statement could be recalled by only one of the two persons to whom it was directed, and two of the three witnesses who were present at the February 9 meeting did not even claim that there were any threats made of firing because of union activity.

Equally unimpressive is the evidence introduced to show that Freide solicited Karen Davis to discourage the "young girls" from joining the Union and improperly interrogated Davis about the Union. As far as the record will allow, this conversation, involving Freide, Davis, and one other employee (in contrast to the February 9 meeting when nearly all the employees were gathered to hear management's views), was so brief and conducted in such a casual manner as to preclude an inference of improper interference or a tendency to be coercive. See *Delco-Remy Division of General Motors Corp. v. N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979). In addition, there is no reliable evidence that Dale Terwilliger engaged in illegal interrogations of employees. The record shows that Terwilliger asked several employees about what was discussed at an employees' meeting held sometime in February (but not the February 9 meeting). Terwilliger's interest, however, is understandable since he had received an

anonymous telephone threat that his arms would be broken if he opposed the Union. There is no evidence linking this phone call with any of the employees or the Union, but the call explains why Terwilliger asked the employees what was discussed at a meeting held prior to the telephone call.

Finally, the evidence is weak that Freide said that continued employment is incompatible with union activity as alleged in paragraph 5(e) of the complaint. In the account given by two witnesses (Akers and Kyle), what Freide said, in effect, was that he did not want a union, that in his opinion a union brought trouble, and that if the employees objected to his views they could leave. While these remarks could conceivably be interpreted by employees as an implied threat of reprisal if union activity continues, it is equally plausible that the remarks were perceived by employees as simply a confirmation that Freide does not like unions, an opinion which he had the right to express under Section 8(c) of the Act, and which could hardly have come as a surprise to the employees.

In sum, what the record shows is that Freide was more cautious and circumspect in his conduct during the Camp Springs campaign than he had been at Seminary Road, but his hostility to the Union remained firm as shown when he overstepped the line of permissible antiunion argument and engaged in unlawful interference by saying he would not bargain collectively. As for the other alleged 8(a)(1) violations cited in complaint paragraphs 5(a), (b), (c), and (e), the evidence is either too meager to support an order, or there was a total failure of proof.

C. The Discharge of Barbara Akers: The Alleged 8(a)(3) Violation

From the outset of the Camp Springs campaign in January 1980, Barbara Akers was identified to union organizers as an employee who was actively seeking a union, and was willing to help organize one. Thereafter, beginning on January 14, 1980, Akers became one of the intermediaries between the union organizers, John Brown and Lisa O'Leary-Young, and the employees of the salon. Akers passed messages from the organizers to her co-workers, distributed union literature, and solicited authorization cards. Her efforts on behalf of the Union must have been known to Dale Terwilliger since he was seen by Terwilliger in conversation with organizer Brown, who wears a windbreaker with the words "Local 400" emblazoned on the back. It is also reasonable to infer that Terwilliger passed on his knowledge of Akers' union activity to Freide, given the fact that Freide was so vehemently opposed to any union attempt to organize his shops.⁶

The chain of events which led to the firing of Barbara Akers on February 20, 1980, began innocently enough when Akers interrupted a conversation between the receptionist, Denise Edwards, and Patricia Hunt, an oper-

⁵ Akers: "He said if we went on strike, he would replace us, and he said he would not bargain in any collective bargaining table"; Kyle: "He told us that if we went on strikes . . . that we'd all lose our jobs, we would be replaced. And, he said, even if we were to get in the union and he was to be at a bargaining table, that he didn't have to bargain at all."

⁶ Freide's testimony that he never discussed union activity with Terwilliger is unbelievable and, in fact, was contradicted by Freide's own statement that "Dale [Terwilliger] had told me that there were rumors because these people had come in passing out pamphlets . . ."

ator, by remarking that Edwards should not believe everything she heard.⁷ This caused Edwards to ask Terwilliger to reprimand Akers about interrupting her conversations. At this point, Freide happened to enter the salon on one of his periodic visits. Terwilliger conveyed to Freide Edwards' request to reprimand Akers. Akers was then asked by Freide to step outside the salon and into the public area of the mall. Akers refused to step outside, insisting that her job or "business" be discussed on the jobsite. Freide then spoke to her in the reception area of the salon. He accused Akers of harassing other employees and spreading rumors and threats. Akers became agitated, and she asked him in a loud voice to identify specific employees whom she had threatened. Freide told her to lower her voice. She refused. Freide told her to leave. Akers asked whether she was fired. At first, Freide replied that she was not fired, and that Akers should "go back and read [her] book." Akers replied, "What, my law book," an obvious reference to her legal right to engage in union activity. As Akers was walking to her station, she was recalled by Freide who said that she was fired for being rude. Akers was not given an opportunity to obtain further elaboration from Freide about the charge that she was spreading rumors or making threats.

The firing of Barbara Akers was an unusual occurrence. She was a competent haircutter, and as Freide testified, "you don't let good hair dresses go." Apparently, Akers was so proficient that she was hired on two occasions. She worked for Respondent between 1976 and 1978, left briefly to work for another salon, and then was rehired in the fall of 1978. That her services were highly regarded is also shown by the fact that Freide interceded on her behalf to ease tensions which had arisen among Akers, a shampoo girl, and an assistant manager.

While Respondent's employees often leave on their own, discharges are so rare that in Respondent's entire chain there have been less than 6 discharges in 20 years, and prior to the Akers discharge, Freide had not been personally involved in a single firing. All discharges, according to Freide, represent "less than 1 to 5 percent . . . a minute amount."

As Freide would have it, this rare event—the firing of Barbara Akers on February 20, 1980—was justified because "she was rude, abusive and impossible." But the record shows that management of Respondent ordinarily does not react as severely as Freide did on February 20 to other brief flurries of indecorous or even embarrassing behavior. There have been several instances when voices have been raised in the presence of customers, and no one was fired. Thus, in early 1980, while operator Becky Kyle was discussing with a customer the benefits of

union membership, she was reprimanded in a loud voice by Dale Terwilliger and told not to discuss the Union. On still another occasion during the summer 1980, operator Karen Davis was reprimanded by Terwilliger, who used a loud and vociferous tone in the presence of customers.

These incidents indicate that management of Respondent is extremely reluctant to fire capable employees. Moreover, there is evidence that even if just cause arises, the employee will usually be given a second or even a third chance to mend her ways. Moreover, should an employee be discharged, there is precedent for her to be reinstated. Against this background, it is simply not plausible that Freide would allow such a trivial incident—Barbara Akers' interruption of a conversation (significantly, not work but apparently a private conversation) between Denise Edwards and Patricia Hunt and Akers' subsequent heated, but brief, exchange with Freide—to assume such serious proportions that it would lead to the discharge of such a capable worker, unless there was an overriding other reason. As it happens, there is positive evidence that Respondent was actively searching for a pretext to fire Akers because of union activity. On February 20, the very day she was fired, Dale Terwilliger was overheard to say that if Akers was just 5 minutes late "she's gone." Besides, it is noteworthy that the conversation between Freide and Akers on February 20 did not center on whether it was proper or improper, polite or impolite, to interrupt Denise Edwards; the conversation became heated when Freide brought up the *real* subject which was bothering management—Akers' efforts on behalf of the Union, which he characterized as spreading rumors and threats.

Under the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), first, the General Counsel must make a *prima facie* showing that protected conduct was a "motivating factor" in the employer's decision to discharge an employee. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity.

The General Counsel has clearly met its burden by showing the following: Barbara Akers was one of the most aggressive supporters of the Union; her activity on behalf of the Union was known to Respondent; Respondent demonstrated a union animus in Freide's remarks during the Seminary Road campaign and his statement that he would never bargain with a union; and on February 20, 1980, Akers was fired notwithstanding her reputation as a competent hairdresser.

Since the General Counsel has met his responsibility for establishing a *prima facie* 8(a)(3) violation, the burden then shifts to Respondent to show that Akers would have been fired anyway even if she had not engaged in union activity. Not only was there a total failure of proof on Respondent's part, but the preponderance of the evidence indicates outright pretext. Terwilliger's statement that if "she [Akers] is five minutes late she is gone" suggests that Respondent was just looking for an excuse to fire Akers. Also, the argument between Freide and Akers began over a matter of the utmost triviality—

⁷ I have considered all accounts of the February 20, 1980, incident—General Counsel's witnesses Akers, Kyle, Davis and Respondent's witnesses Freide, Terwilliger, Edwards (present employees of Respondent), and Hunt (former employee of Respondent)—and except for discrepancies about the tone and voice level of the participants, there were no major differences. The testimony of Becky Kyle that the incident ended with Terwilliger's remark, "there goes your union," was not corroborated by other testimony. Terwilliger testified that he said, "Good riddance" which in itself is an odd reaction of a manager to the departure of a competent employee, and suggests that management was happy to see a union "trouble-maker" leave.

Akers' interruptions of Denise Edwards' conversations—and it became heated only when Freide brought up Akers' alleged spreading of rumors and threats (clearly a reference to Akers' union activity), again indicating that what was really bothering Freide was Akers' union activity and not a petty squabble with a coworker. Moreover, even accepting Freide's statement that Akers was loud and rude during the January 20 argument, it is doubtful that a display of bad manners would have resulted in her firing if she had not been engaged in union activity. Good hairdressers are simply too hard to replace; comparable "scenes" in Respondent's shop have not been grounds for dismissal in the past; and it is reasonable to infer that but for Akers' union activity at most she would have been warned not to raise her voice again in the shop, and to step outside when asked to do so.

Respondent's reliance on *Sullair P.T.O., Inc. v. N.L.R.B.*, 641 F.2d 500 (7th Cir. 1981), as justifying the dismissal of Akers is misplaced. There, an employee was warned against publicly directing profanities toward his employers. In response to this admonition during a companywide meeting, he proceeded to characterize management generally as "rotten m— f—g c—s," and the company controller as a "f—g poor manager." Moreover, the record showed that the employee had a history of such outbursts, that his use of especially ripe profanity even exceeded the "shop talk" standard of the plant, that his outburst disrupted a management-employee meeting, and that the employee acknowledged that he had been fired for insubordination. Similarly, *Badische Corporation*, 254 NLRB 1195 (1980), involved direct employee defiance of a specific order and a willingness to incur the risk of discipline, which had been clearly articulated in advance. In contrast, the brief flareup between Freide and Akers involved no more than perhaps an unseemly raising of voices which clearly had been tolerated on other occasions.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By telling employees that Respondent would never bargain with the Union, Respondent has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discharging Barbara Akers and thereby discouraging membership in the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
5. The unfair labor practices engaged in by Respondent, as set forth in Conclusions of Law 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not engaged in any unfair labor practice not specifically found herein.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, my Order will require Respondent to cease and desist from these practices, and to take such affirmative action as is consistent with the policies of the Act. Therefore, my Order will require Respondent to offer full and immediate reinstatement to Barbara Akers and to make her whole for any losses she may have suffered by reason of the discrimination practiced against her. Any backpay found to be due to Akers shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include interest in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]